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CENTRAL FAX CENTER**FEB 05 2007****In the United States Patent and Trademark Office**

Applicants:	Duane L. McDonald	Docket No.:	17,858.3
Serial No.:	10/749,988	T.C./A.U.:	3728
Confirmation No.:	9975	Examiner:	Bui, Luan Kim
Filed:	December 31, 2003	Date:	February 5, 2007
For:	PACKAGE WITH EASY OPEN FEATURE		

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

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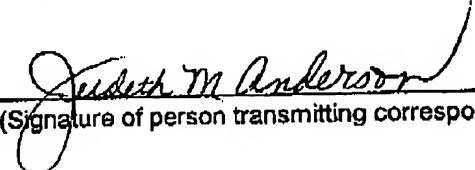
Brief on Appeal (16 pages)

17 total pages, including this page

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Brief on Appeal to the Board of Patent Appeals and Interferences

Mail Stop Appeal Brief - Patents
Commissioner For Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

Pursuant to 37 C.F.R. 41.37 Appellant respectfully submits this Brief in support of his Appeal of Examiner Bui's **Final Rejection** of claims 1-5, 8-14, and 16-20, which was mailed on October 25, 2006.

On January 18, 2007, Appellant, pursuant to 37 C.F.R. 41.31, mailed a timely Notice of Appeal. Thus, the time period for filing this Brief ends on March 18, 2007.

Real Party In Interest

The present Application has been assigned to the Kimberly-Clark Worldwide, Inc.

Related Appeals and Interferences

There are no related appeals and/or interferences with regard to the present Application.

Status of Claims

Claims 1-26 remain in the application with claims 1-5, 8-14, and 16-20 being finally rejected and forming the subject of this Appeal. Claims 6-7 and 15 have been withdrawn.

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Status of Amendments

An amendment after final was filed on December 14, 2006 after the final Office Action mailed on October 25, 2006. The Examiner responded with an Advisory Action mailed on December 29, 2006 entering the amendment after final and continuing the rejection of the claims on the bases stated in the final Office Action.

Summary of Claimed Subject Matter

The following summary correlates claim elements to specific embodiments described in the application specification, but does not in any manner limit claim interpretation. Rather, the following summary is provided only to facilitate the Board's understanding of the subject matter of this appeal.

Independent claim 1 is directed to a package 80 enclosing a single disposable absorbent article 20. See page 13, line 5 to page 22, line 11 and Figs. 11A-18B. The package 80 includes a first piece of material and a second piece of material. See, e.g., page 15, line 23 to page 16, line 3 and Figs. 14A-14B. The first piece of material and the second piece of material are operatively associated with one another to enclose the absorbent article 20, the operative association defining a seal 86, 94. See, e.g., page 15, line 23 to page 16, line 3 and Figs. 14A-14B. At least a portion of the first piece of material and at least a portion of the second piece of material extend beyond the seal 86, 94 to deliver an opening element. See, e.g., page 13, line 22 to page 14, line 3.

Dependent claim 8 is directed to the package 80 of claim 1, wherein the package 80 is vacuum packed. See page 9, line 11 to page 10, line 12 and page 14, line 26 to 34.

Dependent claim 9 is directed to the package 80 of claim 1, wherein the opening element is coded to indicate the size or type of the absorbent article 20. See page 16, lines 4-9.

Dependent claim 10 is directed to the package 80 of claim 1, wherein the absorbent article 20 has a ratio in a folded configuration to an unfolded configuration of no more than 0.09. See page 20, line 26 to page 21, line 2.

Independent claim 11 is directed to a package 80 enclosing a single disposable absorbent article 20. See page 13, line 5 to page 22, line 11 and Figs. 11A-18B. The package 80 includes a layer of material having an interior surface and an exterior surface, the layer of material configured to provide an interior space and at least two lateral seals 86. See page 16, lines 10-24 and Fig. 15. The

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absorbent article 20 is situated within the interior space of the package 80, and a portion of the layer of material extends beyond at least one lateral seal 86 to provide an opening element 88. See page 16, line 10 to page 18, line 22 and Figs. 15-17C. The absorbent article 20 has a folded configuration and an unfolded configuration, and wherein the absorbent article 20 has a ratio of the folded configuration to the unfolded configuration of less than 0.14. See page 20, line 26 to page 21, line 2.

Dependent claim 16 is directed to the package 80 of claim 11, wherein the absorbent article 20 is vacuum packaged. See page 9, line 11 to page 10, line 12 and page 14, line 26 to 34.

Dependent claim 17 is directed to the package 80 of claim 11, wherein the opening element is coded to indicate the size or type of the absorbent article 20. See page 16, lines 4-9.

Dependent claim 18 is directed to the package 80 of claim 17, wherein the opening element is color coded to indicate the size or type of the absorbent article 20. See page 16, lines 4-9.

Dependent claim 19 is directed to the package 80 of claim 17, wherein the opening element is tactilely coded to indicate the size or type of the absorbent article 20. See page 16, lines 4-9.

Independent claim 21 is directed to a package 80 enclosing a single disposable absorbent article 20. See page 13, line 5 to page 22, line 11 and Figs. 11A-18B. The package includes a first piece of material and a second piece of material. See, e.g., page 15, line 23 to page 16, line 3 and Figs. 14A-14B. The first piece of material and the second piece of material are operatively associated with one another to enclose the absorbent article 20, the operative association defining a seal 86, 94. See, e.g., page 18, line 23 to page 20, line 6 and Fig. 18A. The seal defines at least one lateral edge 86 and at least one longitudinal edge 94. See page 18 line 23 to page 19, line 3 and Fig. 18A. At least a portion of the first piece of material and at least a portion of the second piece of material extend beyond the seal to deliver an opening tab, wherein a portion of the opening tab extends beyond at least one lateral edge 86 of the seal, and a portion of the opening tab extends beyond at least one longitudinal edge 94 of the seal. See page 18 line 23 to page 19, line 3 and Fig. 18A.

Dependent claim 25 is directed to the package 80 of claim 22, wherein the package 80 is vacuum packed. See page 9, line 11 to page 10, line 12 and page 14, line 26 to 34.

Dependent claim 26 is directed to the package 80 of claim 22, wherein the absorbent article 20 has a ratio in the folded configuration to the unfolded configuration of no more than 0.09. See page 20, line 26 to page 21, line 2.

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Grounds of Rejection to be Reviewed on Appeal

Ground 1

Claims 1-5 and 21-24 stand rejected under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 5,040,677 to Tubo et al. (hereinafter "Tubo"). Under Ground 1, claims 1-5 and 21-24 are argued as a group.

Ground 2

Claims 8, 10, 25, and 26 stand rejected under 35 U.S.C. § 103(a) as being obvious over Tubo in view of Japanese Patent No. 10-95481 to Narawa (hereinafter "Narawa"). Under Ground 2, claims 8, 10, 25, and 26 are argued as a group.

Ground 3

Claims 11-14 and 20 stand rejected under 35 U.S.C. § 103(a) as being obvious over Tubo in view of U.S. Patent No. 4,801,005 to Hahn et al. (hereinafter "Hahn"). Under Ground 3, claims 11-14 and 20 are argued as a group.

Ground 4

Claim 16 stands rejected under 35 U.S.C. § 103(a) as being obvious over Tubo in view of Hahn and further in view of Narawa. Under Ground 4, claim 16 is argued alone.

Ground 5

Claims 9, 17, and 18 stand rejected under 35 U.S.C. § 103(a) as being obvious over Tubo in view of Hahn, further in view of Narawa, and further in view of U.S. Patent No. 6,640,976 to Franks-Farah et al. (hereinafter "Franks-Farah"). Under Ground 5, claims 9, 17, and 18 are argued as a group.

Ground 6

Claim 19 stands rejected under 35 U.S.C. § 103(a) as being obvious over Tubo in view of Hahn, further in view of Narawa, further in view of Franks-Farah, and further in view of Official Notice. Under Ground 6, claim 19 is argued alone.

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Argument**Ground 1 – Rejection Of Claims 1-5 and 21-24**

Claims 1-5 and 21-24 stand rejected under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 5,040,677 to Tubo et al. (hereinafter "Tubo"). Appellant respectfully submits that the Examiner's rejection is improper and should be reversed.

When asserting a Section 102 rejection, it is well established that there is no anticipation unless (1) all the same elements are (2) found in exactly the same situation and (3) are united in the same way to (4) perform the identical function. Independent claims 1 and 21 (and thus also their dependent claims) each include at least one element not found in Tubo (or the other art of record), namely, a package enclosing a single disposable absorbent article of the subject invention. The Examiner states that the skin wound dressing of Tubo "is inherently capable to absorb and dispose which is considered equivalent to the disposable absorbent article as claimed." Tubo discloses a "skin wound dressing" made up of a cultured human epithelial cell sheet stapled to petroleum jelly-impregnated gauze. See, e.g., col. 3, lines 37-46. There is nothing absorbent or disposable about Tubo's wound dressing. Tubo's wound dressing is not the bandage apparently envisioned by the Examiner, but it is instead a layer of human skin cells attached to a carrier substrate. As such, the wound dressing is certainly not disposable. In addition, the carrier substrate is impregnated with petrolatum precisely so it is not absorbent. This arrangement prevents the layer of skin cells from sticking to the carrier substrate. There appears to be nothing in the Tubo disclosure that describes how the Tubo wound dressing could be "inherently capable to absorb and dispose" as described by the Examiner. With at least this element lacking from the teaching of Tubo, the presented claims cannot be anticipated by Tubo. Therefore, the rejection of independent claims 1 and 21 (as well as their respective dependent claims 2-5 and 22-24) is respectfully requested to be withdrawn.

Ground 2 -- Rejection Of Claims 8, 10, 25, and 26

Claims 8, 10, 25, and 26 stand rejected under 35 U.S.C. § 103(a) as being obvious over Tubo in view of Japanese Patent No. 10-95481 to Narawa (hereinafter "Narawa"). Appellant respectfully submits that the Examiner's rejection is improper and should be reversed.

The Examiner's "Response to Arguments" with respect to this rejection appears to miss the point. The Examiner states that one would look to Narawa for a compact package that may or may not be vacuum packed. But the Examiner uses Narawa for the specific purpose of introducing vacuum packing. Such an addition of vacuum packing to Tubo could lead to catastrophic results as further explained below. In

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addition, Narawa contributes nothing to the Examiner's combination with respect to the subject matter of claims 10 and 26.

To establish a *prima facie* case of obviousness, three basic criteria must be met: (1) there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings; (2) there must be a reasonable expectation of success; and (3) the prior art reference (or references when combined) must teach or suggest all the claim limitations. MPEP §2143.

First, there is no motivation or suggestion in Tubo for one of skill in the art to modify the Tubo disclosure to achieve the claimed invention, and the Examiner has not described any practical motivation or suggestion outside of Tubo to do so. The Examiner states without evidence that vacuum packing Tubo's wound dressing would better protect the wound dressing and would provide for a smaller package such that vacuum packing is desirable. Skin cells and the saline or culture medium in which they are stored do not do well in the lack of oxygen and pressure inherent to a vacuum (e.g. liquids can boil at room temperature in a vacuum). Vacuum packing of such materials is completely undesirable, thus eliminating any motivation or suggestion to do so.

Second, the Examiner has not described in any manner how or even if there might be a reasonable expectation of success in modifying Tubo, where in fact there appears to be more of a reasonable expectation of disaster.

In the alternative, claims 8, 10, 25, and 26 all depend from allowable independent claims as described above and are thus allowable themselves.

Therefore, for at least these reasons, the rejection of claims 8, 10, 25, and 26 is respectfully requested to be withdrawn.

Ground 3 -- Rejection Of Claims 11-14 and 20

Claims 11-14 and 20 stand rejected under 35 U.S.C. § 103(a) as being obvious over Tubo in view of U.S. Patent No. 4,801,005 to Hahn et al. (hereinafter "Hahn"). This rejection is respectfully traversed.

Neither Tubo nor Hahn alone or together teach or suggest all the claim limitations of claims 11-14 or 20 as required by MPEP §2143. Hahn teaches a pleated rubber-and-cardboard matt used to catch oil during an automobile oil change. The matt may be re-folded and reinserted into its original package.

To establish a *prima facie* case of obviousness, three basic criteria must be met: (1) there must be some suggestion or motivation, either in the references themselves or in the knowledge generally

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available to one of ordinary skill in the art, to modify the reference or to combine reference teachings; (2) there must be a reasonable expectation of success; and (3) the prior art reference (or references when combined) must teach or suggest all the claim limitations. MPEP §2143.

First, there is no motivation or suggestion in either Tubo or Hahn for one of skill in the art to modify the Tubo disclosure to achieve the claimed invention, and the Examiner has not described any practical motivation or suggestion outside of Tubo or Hahn to do so. Second, the Examiner has not described in any manner how or even if there might be a reasonable expectation of success in modifying Tubo or Hahn. Tubo has no need of a pleated or folded product, an absorbent product, or a recloseable package. Hahn has no need for a layer of skin cells or a package that can't be reclosed. There is nothing Tubo could gain or improve with reference to Hahn, and there is nothing Hahn could gain or improve with reference to Tubo. To the contrary, it is readily apparent that when each cited reference is considered in its entirety and taken as a whole, a proper combination of the cited references would not teach the Appellant's claimed invention. Only in light of the Appellant's present disclosure and the impermissible use of hindsight would a person of ordinary skill be directed to the significant changes and modifications needed to reconfigure the various components of both references to arrive at Appellant's claimed invention. As such, the invention called for by Appellant's claims is patentable over the cited references.

Therefore, for at least these reasons, the rejection of claims 11-14 and 20 is respectfully requested to be withdrawn.

Ground 4 – Rejection Of Claim 16

Claim 16 stands rejected under 35 U.S.C. § 103(a) as being obvious over Tubo in view of Hahn and further in view of Narawa. This rejection is respectfully traversed.

Neither Tubo nor Hahn nor Narawa alone or together teach or suggest all the claim limitations of claim 16 as required by MPEP §2143.

To establish a *prima facie* case of obviousness, three basic criteria must be met: (1) there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings; (2) there must be a reasonable expectation of success; and (3) the prior art reference (or references when combined) must teach or suggest all the claim limitations. MPEP §2143.

First, as discussed above with reference to claims 11-14 and 20, there is no motivation or suggestion in either Tubo or Hahn for one of skill in the art to modify the Tubo disclosure to achieve the claimed

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invention, and the Examiner has not described any practical motivation or suggestion outside of Tubo or Hahn to do so. Second, the Examiner has not described in any manner how or even if there might be a reasonable expectation of success in modifying Tubo or Hahn. Tubo has no need of a pleated or folded product, an absorbent product, or a recloseable package. Hahn has no need for a layer of skin cells or a package that can't be reclosed. There is nothing Tubo could gain or improve with reference to Hahn, and there is nothing Hahn could gain or improve with reference to Tubo. Narawa doesn't remedy this situation. To the contrary, it is readily apparent that when each cited reference is considered in its entirety and taken as a whole, a proper combination of the cited references would not teach the Appellant's claimed invention. Only in light of the Appellant's present disclosure and the impermissible use of hindsight would a person of ordinary skill be directed to the significant changes and modifications needed to reconfigure the various components of both references to arrive at Appellant's claimed invention. As such, the invention called for by Appellant's claims is patentable over the cited references.

In the alternative, claim 16 depends from an allowable independent claim as described above and is thus allowable itself.

Therefore, for at least these reasons, the rejection of claim 16 is respectfully requested to be withdrawn.

Ground 5 -- Rejection Of Claims 9, 17, and 18

Claims 9, 17, and 18 stand rejected under 35 U.S.C. § 103(a) as being obvious over Tubo in view of Hahn, further in view of Narawa, and further in view of U.S Patent No. 6,640,976 to Franks-Farah et al. (hereinafter "Franks-Farah"). This rejection is respectfully traversed.

Referring to the Examiner's "Response to Arguments," it is unclear to what "printed matter" the Examiner refers in saying that printed matter teaching a new use does not impart patentability. Because claims 9, 17, and 18 make no reference to printed matter, the Examiner's response appears to be misdirected.

Neither Tubo nor Hahn nor Franks-Farah alone or together teach or suggest all the claim limitations of claims 9, 17, or 18 as required by MPEP §2143. Franks-Farah teaches only including color-coding in step-by-step instructions to assist a user in identifying corresponding components of a kit. Tubo and Hahn teach even less. Instructions are quite different from an opening element. No reference or combination of references discloses, teaches, or suggests an opening element coded to indicate the size or type of an absorbent article. In addition, the questionable combination of these references is

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discussed in more detail above. Only in light of the Appellant's present disclosure and the impermissible use of hindsight would a person of ordinary skill be directed to the significant changes and modifications needed to reconfigure the various components of both references to arrive at Appellant's claimed invention. As such, the invention called for by Appellant's claims is patentable over the cited references.

In the alternative, claims 9, 17, and 18 all depend from allowable independent claims as described above and are thus allowable themselves.

Therefore, for at least these reasons, the rejection of claims 9, 17, and 18 is respectfully requested to be withdrawn.

Ground 6 -- Rejection Of Claim 19

Claim 19 stands rejected under 35 U.S.C. § 103(a) as being obvious over Tubo in view of Hahn, further in view of Narawa, further in view of Franks-Farah, and further in view of Official Notice. This rejection is respectfully traversed.

Neither Tubo nor Hahn nor Franks-Farah nor the Official Notice alone or together teach or suggest all the claim limitations of claim 19 as required by MPEP §2143. Franks-Farah teaches only including color-coding in step-by-step instructions to assist a user in identifying corresponding components of a kit. Tubo teaches even less, and the Official Notice does not correct these deficiencies. Instructions are quite different from an opening element. No reference or combination of references discloses, teaches, or suggests an opening element coded to indicate the size or type of an absorbent article.

In the alternative, claim 19 depends from an allowable independent claim as described above and is thus allowable itself.

Therefore, for at least these reasons, the rejection of claim 19 is respectfully requested to be withdrawn.

Conclusion

For the reasons stated above it is Appellant's position that the Examiner's rejection of claims has been shown to be untenable and should be reversed by the Board.

Please charge the \$500.00 fee (fee code 1402), pursuant to 37 C.F.R. 41.20(b)(2), for filing this Appeal Brief to Kimberly-Clark Worldwide, Inc. deposit account number 11-0875. Any additional prosecutorial fees which are due may also be charged to deposit account number 11-0875.

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Respectfully submitted,

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Claims Appendix

The claims on appeal are:

1. A package enclosing a single disposable absorbent article, the package comprising a first piece of material and a second piece of material, the first piece of material and the second piece of material being operatively associated with one another to enclose the absorbent article, the operative association defining a seal, wherein at least a portion of the first piece of material and at least a portion of the second piece of material extend beyond the seal to deliver an opening element.
2. The package of claim 1, wherein the first piece of material and the second piece of material have different rigidities.
3. The package of claim 2, wherein the first piece of material is more rigid than the second piece of material.
4. The package of claim 2, wherein the second piece of material is more rigid than the first piece of material.
5. The package of claim 2, wherein the seal defines at least one lateral edge and at least one longitudinal edge, wherein a portion of the opening element extends beyond at least one lateral edge of the seal, and a portion of the opening element extends beyond at least one longitudinal edge of the seal.
8. The package of claim 1, wherein the package is vacuum packed.

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9. The package of claim 1, wherein the opening element is coded to indicate the size or type of the absorbent article.

10. The package of claim 1, wherein the absorbent article has a ratio in a folded configuration to an unfolded configuration of no more than 0.09.

11. A package enclosing a single disposable absorbent article, the package comprising a layer of material having an interior surface and an exterior surface, the layer of material configured to provide an interior space and at least two lateral seals, the absorbent article being situated within the interior space of the package, wherein a portion of the layer of material extends beyond at least one lateral seal to provide an opening element, wherein the absorbent article has a folded configuration and an unfolded configuration, and wherein the absorbent article has a ratio of the folded configuration to the unfolded configuration of less than 0.14.

12. The package of claim 11 further comprising a longitudinal seal.

13. The package of claim 11 wherein a portion of the layer of material is operatively associated with another portion of the layer of material to provide the interior space.

14. The package of claim 11 wherein the opening element comprises an upper portion and a lower portion.

16. The package of claim 11, wherein the absorbent article is vacuum packaged.

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17. The package of claim 11, wherein the opening element is coded to indicate the size or type of the absorbent article.

18. The package of claim 17, wherein the opening element is color coded to indicate the size or type of the absorbent article.

19. The package of claim 17, wherein the opening element is tactilely coded to indicate the size or type of the absorbent article.

20. The package of claim 14, wherein the upper portion of the opening element and the lower portion of the opening element have different rigidities.

21. A package enclosing a single disposable absorbent article, the package comprising a first piece of material and a second piece of material, the first piece of material and the second piece of material being operatively associated with one another to enclose the absorbent article, the operative association defining a seal, wherein the seal defines at least one lateral edge and at least one longitudinal edge, wherein at least a portion of the first piece of material and at least a portion of the second piece of material extend beyond the seal to deliver an opening tab, wherein a portion of the opening tab extends beyond at least one lateral edge of the seal, and a portion of the opening tab extends beyond at least one longitudinal edge of the seal.

22. The package of claim 21, wherein the first piece of material and the second piece of material have different rigidities.

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23. The package of claim 22, wherein the first piece of material is more rigid than the second piece of material.

24. The package of claim 22, wherein the second piece of material is more rigid than the first piece of material.

25. The package of claim 22, wherein the package is vacuum packed.

26. The package of claim 22, wherein the absorbent article has a ratio in the folded configuration to the unfolded configuration of no more than 0.09.

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Evidence Appendix

None.

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Related Proceedings Appendix

None.